



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 14, 2014

Ms. Sarah Parker
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2014-18316

Dear Ms. Parker:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 539783.

The Texas Department of Transportation (the "department") received a request for the submissions of specified companies in response to specified solicitations. Although you state the department takes no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of third parties. Accordingly, you state and provide documentation showing, you have notified these third parties of the request for information and of their right to submit arguments to this office as to why the requested information should not be released.¹ See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the

¹The third parties notified pursuant to section 552.305 of the Government Code are: AECOM Technical Services Inc., Atkins North America Inc., Bridgefarmer & Associates Inc., Brown & Gay Engineers Inc., CDM Smith, CH2M Hill, Inc., Civil Corp, LLC, Don Durden, Inc. d/b/a Civil Engineering Consultants, Entech Civil Engineers, Inc., H. W. Lochner, Inc., Halff Associates, HDR Engineering, Inc., HNTB Corporation, Jacobs Engineering Group Inc., Klotz Associates, Lamb-Star Engineering, L.P. ("Lamb-Star"), LJA Engineering Inc., Rodriguez Transportation Group, Inc., SAM-Construction Services, LLC ("SAM"), and URS Corporation.

circumstances). We have received comments from Lamb-Star and SAM. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2014-15149 (2014). In that ruling we determined the information at issue must be released, but any information subject to copyright may only be released in accordance with copyright law. With the exception of the information pertaining to Lamb-Star and SAM, we understand there has not been any change in the law, facts, or circumstances on which Open Records Letter No. 2014-15149 was based. Accordingly, we conclude, with the exception of the information pertaining to Lamb-Star and SAM, the department must rely on Open Records Letter No. 2014-15149 as a previous determination and release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note the submitted information pertaining to Lamb-Star and SAM was at issue in Open Records Letter No. 2014-15149. Although Lamb-Star and SAM were notified of the request for their information pursuant to section 552.305 of the Government Code in Open Records Letter No. 2014-15149, neither party submitted comments in response to the request at issue in that previous ruling. Accordingly, in Open Records Letter No. 2014-15149, we concluded the department must release Lamb-Star and SAM's information. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). In this instance, Lamb-Star and SAM have submitted arguments against release of information that was not withheld in Open Records Letter No. 2014-15149. Lamb-Star claims its information is excepted under sections 552.101, 552.104, 552.110, and 552.128 of the Government Code, and SAM claims its information is excepted under section 552.110 of the Government Code. Section 552.104 is a discretionary exception to disclosure and may be waived. *See* Open Records Decision No. 592 (1991) (governmental body may waive statutory predecessor to section 552.104); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Thus, no portion of the information that has been previously released may be withheld under section 552.104. However, because sections 552.101, 552.110, and 552.128 make information confidential, we will consider the submitted arguments under these

exceptions for any information that was previously released. We will also consider the submitted information that was not at issue in the previous ruling.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why the requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, only Lamb-Star and SAM have submitted to this office any reasons explaining why the remaining information should not be released. Thus, we have no basis for concluding any portion of the remaining information constitutes proprietary information of the remaining third parties, and the department may not withhold any portion of the remaining information on that basis. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3.

We now turn to Lamb-Star's and SAM's arguments against release of their information. SAM argues against the release of information that was not submitted by the department. This ruling does not address information that was not submitted by the department and is limited to the information the department has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

Lamb-Star raises section 552.101 of the Government Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. We understand Lamb-Star to argue its information is subject to section 552.101 of the Government Code in conjunction with the common-law as a trade secret. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates

or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Huffines, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.² RESTATEMENT OF TORTS § 757 cmt. b. Having considered its arguments, we find Lamb-Star has failed to demonstrate any of the information it seeks to withhold meets the definition of a trade secret, nor has Lamb-Star demonstrated the necessary factors to establish a trade secret claim for this information. Thus, none of Lamb-Star's information may be withheld under section 552.101 in conjunction with the common law as a trade secret.

Section 552.110 of the Government Code protects (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). As noted above, the Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or

²The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5.

Lamb-Star and SAM argue their information constitutes trade secrets under section 552.110(a). Upon review, we find Lamb-Star and SAM have failed to establish a *prima facie* case that their information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for its information. *See* ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). Accordingly, none of the submitted information may be withheld under section 552.110(a) of the Government Code.

Lamb-Star and SAM further argue the submitted information is excepted under section 552.110(b) of the Government Code. However, we find Lamb-Star and SAM have failed to demonstrate the release of any of their information would result in substantial harm to its competitive position. *See* ORDs 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence substantial competitive injury would result from release of particular information at issue), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, none of Lamb-Star's or SAM's information may be withheld under section 552.110(b) of the Government Code.

Lastly, we address Lamb-Star's argument under section 552.128(c) of the Government Code. Section 552.128(c) provides:

[i]nformation submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list, including information that may also have been submitted in connection with an application for certification as a historically underutilized or disadvantaged business, is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

Gov't Code § 552.128(c). In this instance, Lamb-Star submitted its proposal to the department in connection with a specific proposed contractual relationship with the department. We therefore conclude the department may not withhold any portion of Lamb-Star's information under section 552.128 of the Government Code.

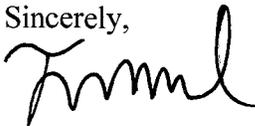
In summary, with the exception of the information pertaining to Lamb-Star and SAM, the department must rely on Open Records Letter No. 2014-15149 as a previous determination

and release the identical information in accordance with that ruling. The department must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 539783

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. David C. Johnston
Brown & Gay Engineers
10777 Westheimer, Suite 400
Houston, Texas 77072
(w/o enclosures)

Mr. Ovidio N. Alanis
Entech Civil Engineers
16360 Park Ten Place, Suite 230
Houston, Texas 77084
(w/o enclosures)

Mr. Darren James Willer
HNTB Corporation
2950 North Loop West, #900
Houston, Texas 77092
(w/o enclosures)

Mr. David Balmos
Klotz Associates
1160 Dairy Ashford, Suite 500
Houston, Texas 77079
(w/o enclosures)

Mr. Todd Thurber
LJA Engineering
2929 Briarpark Drive, #600
Houston, Texas 77042
(w/o enclosures)

Ms. Katherine Holtz
Sam - Construction Services
11111 Katy Freeway, Suite 200
Houston, Texas 77079
(w/o enclosures)

Mr. Randy Bena
Civil Corp
2825 Wilcrest Drive #460
Houston, Texas 77042
(w/o enclosures)

Mr. Wendell L. Barnes
Jacobs Engineering Group
5995 Rogerdale Road
Houston, Texas 77072
(w/o enclosures)

Mr. Gilbert Sylva
Rodriguez Transportation Group
Suite 101
17510 Huffmeister Road,
Cypress, Texas 77429
(w/o enclosures)

Mr. Duane Schwartz
Jacobs Engineering Group
Suite 425
911 Central Parkway North
Austin, Texas 78735
(w/o enclosures)

Mr. Glen McCabe
CH2M Hill
9311 San Pedro Avenue, Suite 800
San Antonio, Texas 78216
(w/o enclosures)

Mr. Brent Patterson
AECOM Technical Services
5444 Westheimer Road, Suite 200
Houston, Texas 77056
(w/o enclosures)

Mr. Barrett Atkins
Bridgefarmer & Associates
2500 East T.C. Jester, Suite 125
Houston, Texas 77008
(w/o enclosures)

Mr. Robert "Butch" Babineaux
CDM Smith
3050 Post Oak Road
Houston, Texas 77056
(w/o enclosures)

Mr. Timothy J. Weight
H W Lochner
810 Hesters Crossing, Suite 225
Round Rock, Texas 78681
(w/o enclosures)

Mr. Frank Jaster
Don Durden
115500 IH-10 West
Suite 395
San Antonio, Texas 78230
(w/o enclosures)

Lamb-Star Engineering
c/o Mr. Kevin J. Allen
Jones, Allen & Fuquay
8828 Greenville Avenue
Dallas, Texas 75243-7143
(w/o enclosures)

Mr. Rafael Cruz-Rodriguez
Atkins North America
6504 Bridge Point Parkway, Suite 200
Austin, Texas 78735
(w/o enclosures)

Mr. Robert "Bob" E. Leahey
HDR Engineering
1020 NE Loop 410, Suite 400
San Antonio, Texas 78209
(w/o enclosures)

Ms. Krishna Peapully
URS Corporation
Suite 6000
1950 North Stemmons Freeway
Dallas, Texas 75207
(w/o enclosures)

Ms. Katherine Holtz
Sam-Construction Services
Parkway 2, Suite 100
4801 Southwest Parkway
Austin, Texas 78735
(w/o enclosures)

Mr. Gregory A. Jacobs
Halff Associates
300 East Sonterra Boulevard, Suite 230
San Antonio, Texas 78258
(w/o enclosures)

Mr. Todd Thurber
LJA Engineering
2929 Briarpark Drive, #600
Houston, Texas 77042
(w/o enclosures)